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No. 94-1462

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LUCAS P. BAEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition is far more significant for what it does *not* say than it is for what it contains. Respondent concedes that the circuits are divided as to the meaning of Section 106(c) of the INA and over the availability of post-deportation review. Respondent also does not deny that the questions presented implicate fundamental and important issues of statutory and constitutional law. Indeed, the need for this Court's immediate review is underscored by the *amicus curiae* brief filed by four separate *amici* in support of our petition. Perhaps most notably of all, respondent makes no attempt in its brief to defend either the holding or the reasoning of the court of appeals, or to challenge our principal contentions that § 106(c) forecloses judicial review only as to those aliens who have voluntarily departed the United States—not those who have been involuntarily deported—and that the court of appeals' contrary reading of the statute raises serious and unanswered constitutional questions that warrant review.

Rather than challenge the substance of our petition, respondent's brief in opposition attempts to argue that this case "is not an appropriate vehicle" for consideration of the questions presented. In fact, however, as we demonstrate below, *none* of the factual and legal arguments contained in respondent's brief have anything to do with the issues properly presented for review, or provide the slightest basis for denying review. Indeed, all of the grounds upon which review in this Court is sought remain unchallenged by respondent, thus confirming both that review of the questions presented is warranted, and that the decision of the First Circuit in this case is indefensible.

I. RESPONDENT'S BRIEF IN OPPOSITION MAKES NO EFFORT TO DEFEND THE COURT OF APPEALS' RULING AND INSTEAD ATTEMPTS TO EVADE REVIEW ON WHOLLY IRRELEVANT GROUNDS

A. Respondent's assertion that the procedural posture of this case makes review inappropriate is plainly incorrect. Respondent argues that this Court's decision in *Stone* v. *INS*, 115 S. Ct. 1537 (1995), deprived the court of appeals of jurisdiction to hear petitioner's appeal, thereby obviating the question of § 106(c)'s application to this case. Yet, respondent's own brief unequivocally demonstrates that these contentions are unfounded.

Respondent concedes (at 7) that petitioner filed a timely appeal to the court of appeals within 90 days of the BIA's denial of his motion to reopen. Respondent also concedes, as it must, that the First Circuit dismissed petitioner's appeal from the denial of his motion to reopen and from the BIA's underlying order of deportation *solely* because of the court's holding that it lacked subject matter jurisdiction under § 106(c). Br. In Opp. 5-6; Pet. App. 2a, 14a. The court of appeals' holding it did not have jurisdiction to even consider the appeal from the denial of the motion to reopen is the decision that we ask this Court to review in our petition. Whether the court would have had jurisdiction under *Stone* to review the BIA's original order of deportation in addition to its denial of the motion to reopen is irrelevant and would not affect this Court's consideration of the questions presented. As explained by the court of appeals (Pet. App. 5a n.4) in rejecting this contention:

> [w]e need not probe this point, for even if INS is correct in its view—a matter on which we do not pass—it has not argued that the petition for review is untimely as to the Board's jettisoning of the motion to reopen.

Although the First Circuit dismissed petitioner's appeal for lack of jurisdiction under § 106(c), respondent also attempts to defend the BIA's underlying rulings on grounds that the court of appeals held it lacked jurisdiction to consider under § 106(c). For example, respondent argues (at 9-10) that the BIA properly denied petitioner's motion to reopen, and that the its decision is subject to a deferential "abuse of discretion" standard of review. What respondent forgets, however, is that petitioner never got a *chance* to have the BIA's rulings considered by the court of appeals at all under any standard of review. The court never reached those issues given its holding that it was "powerless" to consider them under § 106(c) since petitioner already had been deported.[1]

Respondent also attempts to defend the BIA's denial of petitioner's motion to reopen by pointing to 8 C.F.R. § 3.2, claiming (at 9) that "there is no reasonable argument that the BIA abused its discretion in refusing to reopen the proceedings." Respondent's reliance on Section 3.2, however, begs the questions presented and confirms the need for guidance from this Court. Section 3.2 applies only to cases involving an alien's "departure" from the United States. The central question raised by the petition (at 16-20), however, is whether in both the INA and its accompanying regulations, the term

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[1] Respondent likewise argues (at 10) that "[b]ecause the only issue properly before the court of appeals was whether the BIA correctly construed its own regulation to preclude it from acting on petitioner's motion to reopen, the issue on which petitioner seeks review is not properly presented." Once again, however, respondent's argument fails to take account of the procedural posture of this case since the court of appeals never *reached* the question of whether the BIA properly denied petitioner's motion to reopen given its threshold ruling that it lacked jurisdiction. *That* is the question over which the circuits have split and on which review now is sought.

"departure" connotes only a *voluntary* departure from the United States, or is also applicable to involuntary deportations. Citing Section 3.2 does nothing to answer that question.

B. Similarly irrelevant are respondent's arguments that petitioner was not denied due process since (a) his counsel, in the few hours after his request for a stay of deportation was denied by the BIA and before his deportation was carried out, could have pursued other avenues for seeking a stay, and (b) his counsel allegedly was sent by respondent a copy of the BIA's final order of deportation. Both of these disputed factual issues are immaterial to the discrete questions of federal law on which review is sought, and would not have to be addressed by the Court at all in its review of those questions.[2]

Contrary to the suggestion in respondent's brief, petitioner is *not* asking this Court to hold that he was denied due process by virtue of his deportation without proper notice to his counsel. In fact, the petition does not challenge the propriety of petitioner's deportation *at all*. Instead, petitioner asks this Court to hold (1) that he did not lose his right to seek judicial review under § 106(c) simply because of his involuntary removal from the United States, and (2) that if he did lose that

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[2] Although not relevant to this appeal, it should be noted that respondent's factual assertions are largely devoid of record support. For example, respondent falsely implies that petitioner's counsel, who had changed addresses, never checked his mail at his old address. In fact, as the court of appeals found, uncontradicted evidence was offered below that petitioner's counsel *routinely* checked his mail at the address listed in the BIA's decision, and that a copy of the BIA's decision was never received. Pet. App. 6a. Respondent also falsely claims (at 7 n.6) that petitioner's motion to reopen was improper because it did not allege any new evidence. However, petitioner's motion *did* contain new evidence that his counsel had not been served with a copy of the Board's decision in violation of INS regulations.

right under § 106(c), the statute violates Article III and the Due Process Clause of the Fifth Amendment. Notably, respondent raises no challenge to *either* of these points. Indeed, respondent makes no attempt to defend the court of appeals' reading of § 106(c) at all other than its half-hearted assertion (at 10) that INS' interpretation of the term "departure" should be accorded "broad deference."

In sum, respondent's attempts to defend the First Circuit's ruling on grounds that the court itself found it had no jurisdiction to consider confirms that the court's jurisdictional holding cannot be defended. Through its brief in opposition, respondent obviously hopes to distract the Court by raising factual and legal issues that simply have nothing to do with the questions presented in the petition—both of which are properly presented for review in this case.

II. § 106(C) APPLIES ONLY TO VOLUNTARY DEPARTURES AND NOT DEPORTATIONS

The brief in opposition concedes (at 6) that the courts of appeals are deadlocked over the meaning of § 106(c). This split will not be resolved unless and until the Court provides definitive guidance as to the meaning of § 106(c) and the availability of post-deportation judicial review. In fact, as explained above, respondent notably makes no effort *at all* to defend either the holding or the reasoning of the First Circuit's decision below.

In the petition, we demonstrated that the terms "depart" and "deport"—used disjunctively throughout the statute—have different meanings. Pet. 18-21. Thus, as our supporting *amici* also demonstrate, § 106(c) does *not* apply to involuntary removals from the United States. See Br. of *Amici Curiae*, at 8-10, 16-19. Respondent makes no attempt to refute our reading of the statute. In short, the circuits are deeply divided over the meaning of § 106(c), and the *only* construction of the

statute that fully gives effect to its terms and is consistent with this Court's well-established principles of statutory construction is that § 106(c) does not apply to involuntary departures at all.

Unable to explain away the circuit split over the meaning of § 106(c), or to defend the holding of the court of appeals below, respondent argues that this Court should nevertheless deny review because petitioner's deportation was not carried out illegally and did not violate his right to due process. This argument fails for any number of reasons. As explained above, the particular circumstances of petitioner's deportation are irrelevant to the questions presented here. The primary legal issue for which review is whether § 106(c) applies to involuntary removals from the United States, including those cases where aliens have been deported illegally and in violation of their right to due process. Should this Court hold that § 106(c) applies only to voluntary departures, the circumstances surrounding petitioner's deportation would be immaterial. Alternatively, should the Court hold that § 106(c) is inapplicable where aliens are illegally removed from the United States, this Court likewise would not be called upon to resolve any of the disputed factual issues raised by respondent concerning the circumstances of petitioner's deportation.[3]

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[3] As we demonstrated in our petition (at 12-15), petitioner would have been accorded relief in each of the circuits that have recognized exceptions to § 106(c) given that his deportation was carried out without proper notice to his counsel and in violation of the notice requirements of 8 C.F.R. § 243.3. Respondent does not deny that such a deportation would be illegal and violate due process. Instead, it falsely suggests that "uncontested" evidence was offered below that respondent served a copy of the Board's order of deportation. Br. In Opp. 11. In fact, as noted by the court of appeals (Pet. App. 6a), respondent was unable to offer *any* actual evidence that the Board's order of deportation was sent (such as a transmittal letter or log book

Instead, such factual issues would properly be left for resolution on remand.

In the end, it remains fully apparent that the courts have not and will not be able to reach any consensus as to the meaning of § 106(c) and the availability of post-deportation review without guidance from the Court—guidance that the circuits themselves specifically have requested. *Bar-Levy v. United States Dep't of Justice*, 990 F.2d 33, 36 (2d Cir. 1993). Immediate review is also especially justified in this case because, as the brief of *amici* attests, the decision below has had real and serious consequences for immigrants and immigration practitioners who no longer have a confident understanding of the basic procedures that must be followed under § 106 to seek judicial review. The questions presented in this case raise fundamental and important issues of federal law that are certain to recur. Respondent's factual distractions aside, this case provides an ideal and long-awaited opportunity for the Court to resolve these issues.

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notation). Instead, it only offered the affidavit of an INS employee who lacked personal knowledge of this case as to the procedures usually followed for service of final deportation orders. Such evidence, however, courts has been rejected as providing proof that a final order has been served. See, *e.g.*, *Quedraogo v. INS* , 864 F.2d 376, 378 (5th Cir. 1989) (vacating order of dismissal since INS had not properly served a copy of BIA decision, noting that "[c]ounsel for the INS has been unable to locate any letter of transmittal or contemporaneous notation (such as an entry on a docket sheet) documenting the mailing of the . . . order").

III. AS READ BY THE COURT OF APPEALS, § 106(C) VIOLATES ARTICLE III AND THE DUE PROCESS CLAUSE

In the petition, we demonstrated that § 106(c), if read to categorically preclude judicial review of final orders of deportation even in the face of colorable due process claims, violates the guarantees of judicial review contained in both Article III and the Due Process Clause of the United States Constitution. Notably, respondent raises no challenge to this point except to argue on the merits that petitioner would not be able to establish a due process violation if afforded the opportunity to make such a showing. Once again, however, such arguments ignore the procedural posture of this case and fail to confront the threshold issues on which review is being sought.

In the petition, we explained (at 5) that the First Circuit, noting that "courts have split on the question of whether [§ 106(c)'s] jurisdictional bar is subject to a due process exception," ordered the parties to brief "the issue of whether counsel's eleventh-hour notice of the scheduled deportation might trigger a possible exception to [§ 106(c)] -- a matter of some dispute." Pet. App. 15a-16a. After briefing, the court held that it was "powerless" to consider petitioner's due process claim since "[a] judge-made exception to section [106(c)'s] jurisdictional, even one limited to 'colorable' due process claims--whatever that terms may eventually come to mean--can too easily expand to engulf the general rule prohibiting review and thereby thwart achievement of the congressional goal." Pet. App. 12a. Thus, the court made no findings as to whether or not an actual due process violation occurred in this case.

In its brief in opposition, respondent does not question the authorities cited in the petition which establish that a deportation carried out without proper notice to counsel violates due process. See Pet. 9-10. Instead, it merely argues (at 11) that petitioner "has no colorable claim of a due process

violation" because of "conflicting evidence" which it claims shows that petitioner's counsel was sent a copy of the BIA's final order of deportation. In fact, respondent's "evidence" was insufficient as a matter of law to show that it served a copy of the BIA's order of deportation on petitioner's counsel. See *supra* at 6 n.3. But in any event, respondent's brief at most proves that there exist material issues of fact that would have to be resolved to determine whether or not petitioner's deportation violated due process. As respondent well knows, these factual issues have *nothing* to do with the discrete legal issues presented for review, and provide no basis for evading further review of these important constitutional questions. See R. Stern, E. Gressman, S. Shapiro and K. Geller, SUPREME COURT PRACTICE § 4.14, at 190-91 (7th ed. 1993). Instead, such incidental factual issues would properly be left for remand should this Court hold that § 106(c) constitutionally cannot bar judicial consideration of colorable due process claims.

In the petition, we demonstrated (at 22-25) the confusion that now exists among courts and scholars as to the constitutional necessity of judicial review of agency action. We also cited several recent cases in which the Court has recognized this issue as a "serious" and "difficult question of constitutional law"—and one that the Court has yet to resolve. These points are uncontested by respondent. See *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Superintendent v. Hill*, 472 U.S. 445, 450 (1985); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). More importantly, though, respondent also makes no attempt to defend the constitutionality of § 106(c), let alone support the flawed constitutional reasoning offered by the court of appeals.

In sum, contrary to what respondent would have this Court believe, the question presented here is *not* whether petitioner's due process rights were violated in this particular case. Indeed,

petitioner never got the chance to have that claim considered given the court of appeals' threshold conclusion that it was powerless to entertain it. The issue properly presented for review is instead the basic question of whether the federal courts can constitutionally be barred by Congress from exercising jurisdiction to hear such claims. As *amici* explain, the time has come for the Court to resolve once and for all this fundamental question and to determine whether Congress may insulate an agency of the executive branch from judicial scrutiny, even to consider claims that the agency has violated the Constitution. This case provides an ideal opportunity to resolve this important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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